In the Supreme Court of the United States.

OCTOBER TERM, 1921.

AMERICAN SMELTING AND REFINING COMPANY, appellant,
v.
THE UNITED STATES. } No. 221.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF ON BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The facts stated in the petition which are, in our judgment, relevant to the only questions raised in the case are as follows:

(1) After certain preliminary correspondence with another party, the proper authorities of the United States addressed to claimant the following letter (R. 31, 32, Ex. F):

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Ref. No. P. R. 2158.
Sym. P. 4219–1788 A.
File P. R.

WAR DEPARTMENT,
OFFICE OF THE CHIEF OF ORDNANCE,
PROCUREMENT DIVISION,
SIXTH AND B STREETS NW.,
Washington, March 28, 1918.
M. D. W. bef.

AMERICAN SMELTING & REFINING CO.,
120 Broadway, New York City.

GENTLEMEN:

Subject: 30,000 Metric tons copper for French Government.
War Ord. P. 4219–1788 A.

1. I am directed by the Acting Chief of Ordnance to advise you that the Procurement Division is prepared to procure from you 30,000 metric tons (66,138,000 pounds) of copper at a price of 23½ c. per pound net, f. o. b. New York basis.

2. Deliveries are to be completed on or before June 1, 1918.

3. Shipping instructions with reference to all shipments should be taken up with the supply division, Ordnance Department, Major Jewett.

4. It is requested that your company keep in touch with the French High Commission, as to shapes, sizes, and specifications, which they will require on this contract.

5. Inspection on the part of the French Government will be made at the refineries.

6. Payment papers are to be made out in accordance with attached instructions pertaining to shipment of raw materials and payment papers.

7. The above-mentioned copper is to be prime lake or electrolytic 99.9% pure, not less than 99.88% pure according to standard of American Society for testing materials.

8. Your acceptance of this letter is requested pending issuance of formal contract which will go forward in a few days.

Respectfully,

RAW MATERIALS SECTION,
R. P. LAMONT,
Lt. Col. Ord. N. A.
By T. S. CHALMERS,
Capt. Ord. R. C.

Attachment: (1) copy of instructions on shipments.

To this letter the claimant made the following reply (R. 34, Ex. I):

AMERICAN SMELTING & REFINING CO.,
120 BROADWAY,
New York, April 11, 1918.

Lieut. Col. R. P. LAMONT,
Procurement Division,
Raw Materials Section,
Washington, D. C.

Attention Capt. Chalmers.

DEAR SIR:

Subject: 30,000 metric tons copper for French Government.
War Ord. P. 4219, 1788 A.

We have your favor March 28th under the above reference number, and take pleasure in accepting your letter as above pending issuance of formal contract which we hope to receive in the near future.

Yours truly,

AMERICAN SMELTING & REFINING CO.,
H. M. BRUSH.

(2) The price stated in the above letter of March 28, 1918, viz, 23½ cents per pound net f. o. b. New York basis, was the same as the maximum price for copper, to governments and individuals, agreed upon, until June, 1918, by the War Industries Board and the copper producers, including claimant. (Official Bulletin, September 21, 1917, p. 1; do., January 23, 1918, p. 4.) No further agreement, however, was reached as to the price of copper until July 2, 1918, when an agreement between the War Industries Board and the copper producers (based on cost of production) was approved by the President to the following effect:

> That the maximum price on copper shall be 26 cents per pound, taking effect July 2, but subject to revision after August 15, f. o. b. cars or lighters at refinery, if shipped from eastern refineries, and f. o. b. New York if shipped from western refineries, subject to the additional charges on copper shapes approved by the price-fixing committee on June 5, 1918. (Official Bulletin, July 5, 1918, p. 4.)

(3) Immediately upon receipt of the letter of March 28, 1918, claimant began furnishing copper in accordance with the terms stated therein (R. 4). On June 1 it had delivered 10,575 tons (R. 5); on July 2, 19,609 tons (R. 5). Omitting 1,091 tons (as to which no claim is made, R. 5), there was left for shipment after July 2, 1918, 9,299 tons (R. 5).

(4) The reason for failure of claimant to deliver all of the 30,000 tons by July 2, 1918, was, either that the proper officers of the United States did not furnish, in due time, the necessary shipping directions, or that it was not possible to ship such an amount before July 2d under existing conditions. (R. 5.)

(5) After July 2, 1918, claimant continued to deliver copper until it had delivered the entire 30,000 tons called for by the order of March 28, 1918, and it was paid in full for all said copper at the price stated in said order.

(6) The United States having refused to pay more than 23½ cents a pound for the copper delivered after July 2, 1918, the present petition was filed claiming just compensation for the copper delivered after said date, as being taken under the Government's power of eminent domain, which just compensation the petition alleges to be the maximum price agreed upon by the War Industries Board and the copper producers on July 2, 1918, as set forth in paragraph 2 above, viz, 26 cents per pound.

ARGUMENT.

(*a*) When the above facts are studied in connection with the external conditions affecting the parties and the relevant statutes referred to in Appendix No. 3 to claimant's brief, it will be perceived that the question of law involved is very simple, viz, whether the right of the claimant to compensation for the copper delivered after July 2, 1918, and the corresponding duty of the United States to make

payment therefor are governed by a conventional arrangement made by the letter of March 28, 1918, and the reply thereto of April 11, 1918, or whether such right and duty are created and imposed by law by reason of a taking of said copper after said date under the power of eminent domain. The United States maintains the former proposition, the claimant the latter.

(*b*) Before considering which one of these propositions finds the most support in the allegations of the petition and the exhibits attached thereto, certain collateral points made by claimant to demonstrate that no conventional arrangement could have been arrived at by the parties may be noticed.

1. There can be no doubt that in March, 1918, power was vested in officers of the United States to enter into an agreement as to compensation to be paid for articles purchased for the Government. Section 3709, Revised Statutes, authorizes such an agreement when public exigency requires, and there can be no dispute as to the public exigency in the matter of copper in March, 1918.

2. The fact that the agreement, if made at all, was made by letters and not in the manner or form required by section 3744, Revised Statutes, can not be taken advantage of by claimant. (*United States* v. *New York & Porto Rico S. S. Co.*, 239 U. S. 88.) Moreover, the contract was executed, so that even the United States could not have relied on section 3744, Revised Statutes. (*St. Louis Hay & Grain Co.*

v. *Unit* *United States*, 191 U. S. 159; *United States* v. *Andrew* *Andrews*, 207 U. S. 229.)

3. Th 3. There is no principle of the law of contracts which p hich prevents the letter of March 28, 1918, and the reply th ply thereto of April 11, 1918, from constituting a valid ag alid agreement as to the compensation to be paid for the r the copper delivered after July 2, 1918, merely because cause the parties contemplated the subsequent executio ecution of a formal contract. Whether the parties intended ended the letters to be the agreement, the later formal mal instrument being merely a memorial thereof, or whet whether they intended the letters as merely preliminary inary negotiations to be merged subsequently in the form formal contract, must be determined by the court from th n the facts alleged in the petition. (*Jenkins & Reynold nolds Co.* v. *Cement Co.*, 147 Fed. 641, 655, 658, and cas cases cited; *Whitted & Co.* v. *Cotton Mills*, 210 Fed. 72 725, 732; *United States* v. *Construction Co.*, 224 Fed. 85 859, 862.)

4. Th That the law operative at the time the letters of March 2 ch 28, 1918, and April 11, 1918, were written, viz, section ion 120 of the national defense act of June 3, 1916, c. 134, 4, 39 Stat. 166, 216, authorized the United States to place ace obligatory orders for, e. g., copper, subject to the pay payment of just compensation therefor, did not prevent ent an agreement between the parties as to what just co compensation should be, both because the statute te referred to expressly provided that the powers thereby by conferred were in addition to the method of fixing t the compensation by agreement, and because

parties may always, as a matter of course, agree as to the compensation to be paid for property taken under the power of eminent domain, instead of resorting to the courts.

(c) Coming to the question whether or not the facts alleged in the petition, when properly construed, show an agreement between the parties as to the compensation to be paid for all and every part of the 30,000 tons of copper, whether delivered before or after July 2, 1918, it appears that on March 14, 1918, the proper officer of the United States wrote the United Metals Selling Company that the former was prepared to procure from the latter 30,000 tons of copper at 23½ cents per pound, deliveries to extend over a period of 6 months and made at the rate of 5,000 tons per month, beginning in March. Acceptance of the letter was requested, pending the issuance of a formal contract. (R. 26, 27, Ex. A.) To this letter the United Metals Selling Company replied on March 19th, expressly stating that they could not accept an order for delivery after June 1st because the maximum price for copper had only been agreed to up to that date, and asking that the order be split up into 15,000 tons deliverable prior to June 1st at 23½ cents per pound and 15,000 tons deliverable after that date at a price to be determined. (R. 27, 28, Ex. B.) On March 23d the proper officer of the United States replied that the order would be changed, not to split orders for 15,000 tons each, but to one order for 30,000

tons deliverable before June 1st, of course at 23½ cents per pound, and acknowledgment of the letter was requested. (R. 28, 29, Ex. C.) The requirement as to delivery of the whole 30,000 tons before June 1st was repeated and confirmed in the letter of March 25th. (R. 30, Ex. D.) Whereupon the United Metals Selling Company replied, on March 26th, making no objection whatsoever to the change in the requirement as to shipments, but requesting that the order be sent to the claimant, which had been consulted and had stated that it would fit in with its other business to handle the order. (R. 30, 31, Ex. E.) Accordingly the order was sent to the claimant on March 28th in the letter quoted above (Ex. F, R. 31), and the claimant, being fully advised, of course, as to all the previous correspondence, sent its acceptance of April 11th, quoted above. (R. 34, Ex. I.) Moreover, this acceptance was sent as the result of a letter written claimant by the Copper Producers Committee on April 10th to the effect that an acceptance of the order was necessary to complete the record and to warrant payments (R. 32, 33, Ex. G), and was accompanied by a letter from the claimant to the Copper Producers Committee, dated April 11th, in which no objection whatsoever is taken to the price or to the requirement of delivery before June 1st (though objections are taken to other details of the order), and it is specifically stated that the claimant deemed it

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roper "to acknowledge the letter" (i. e., accept ne offer) "of March 28th as it stands."

If this were a case between private parties in rdinary times, it would be idle to attempt to argue hat the letters referred to did not constitute a valid greement as to the compensation to be paid for all f the 30,000 tons of copper. The parties negotiated vith each other as to the terms, and specifically as o deliveries and the price therefor, until their minds net in a clear, definite expression on all the essential erms of the agreement. It is true that a later formal ontract is referred to, but this was evidently to be nerely a memorial of the agreement, in compliance vith section 3744, Revised Statues, and was not hought of by either party as a condition to the reation of binding, contractual obligations on each.

(*d*) It is argued that, because the copper in question could have been requisitioned under the authority of section 120 of the national defense act of June 3, 1916, c. 134, and undoubtedly would have been requisitioned had the claimant refused to obey the order of March 28, 1918, therefore that order was itself a requisition under which the claimant is entitled to just compensation for the copper taken. To this there are two answers:

1. The power to requisition, conferred by the national defense act, did not supplant the ordinary method of a negotiated contract. On the contrary it was expressly declared to be merely additional to such method. The question is still left open, there-

fore, whether the facts alleged in the petition show a requisition or a contract. When examined fairly and in their entirety they not only show a negotiated contract, but are inconsistent with a requisition. Two facts are particularly significant. The United States insisted upon an acceptance of the order. This was not necessary, and therefore would not have been required, had a taking *in invitum* been intended. In addition a price was fixed, and, after objection as to applying such price to shipments after June 1st, the order was changed (and, as changed, accepted) so as to require shipments before June 1st at the price stated. If a taking, at a just compensation to be determined, were intended, the price would have been of no importance, and, therefore, would not have been the subject of negotiation and agreement. It is true that the price agreed upon was the same as the maximum fixed by the War Industries Board and the copper producers, but this fact, if material, merely puts back the agreement as to price between the United States and the claimant to an earlier period.

2. Even if the letter of March 28, 1918, be admitted to have, for some purposes, the effect of a taking under the power of eminent domain, it does not follow that it may not also be an agreement governing in all respects the compensation to be paid in any event for all the 30,000 of copper whenever delivered.

Such an agreement does not violate any rule of law. The Government may exercise its power of

eminent domain, and yet, while doing so, enter into a valid agreement with the owner of the property as to the price to be paid for it. Unless written words and actions mean nothing, that is, at the very least, what was done in the present case. Whether or not the claimant thought that its property was being requisitioned, it certainly entered into a binding agreement as to the amount of its just compensation. And this is also shown by the fact that the petition does not claim that the court shall determine the just compensation to which the claimant is entitled for the copper shipped after July 2d, but only that the maximum price, viz, 26 cents per pound, agreed upon by the War Industries Board and the copper producers on July 2, 1918, shall govern. It thus itself relies for its compensation upon an agreement, only it claims the right to substitute for a particular agreement as to a specific tonnage of copper entered into on March 28, 1918, a later general agreement as to the maximum future price of all copper.

It is this second aspect of the matter, viz, that the order of March 28, 1918, may have had, for some purposes, the effect of a requisition and yet a valid agreement have been nevertheless entered into governing in all respects the compensation to be paid for all the copper, whenever delivered, which furnishes an answer to the case relied upon by counsel for claimant, namely, *Moore* v. *Roxford Knitting Co.*, 250 Fed. 278, affirmed 265 Fed. 177, and to *Mawhinney* v. *Milbrook Woolen Mills*, 172 N. Y. Supp.

461, 188 App. Div. 971, 231 N. Y. 290 (not referred to by counsel).[1] In these cases it was held that orders (claimed by counsel to be similar to the order of March 28, 1918, in the present case) which stipulated priority over existing commercial contracts excused default on such contracts. It was not, however, held or intimated by any of the courts in these cases that the acceptance of the orders did not constitute a contract as between the Government on the one side and the producer, manufacturer, or vendor on the other. On the contrary, the opinions in these cases contain many expressions showing that the courts assumed, as without question, a contract between the parties referred to as to prices, delivery, etc.

To sum up, there may be a taking under the power of eminent domain, which involves or draws after it a contract as to the manner in which the taking shall be accomplished, and the compensation to be paid for the property taken. When this is the case, the taking may be separated or divorced from the contract and the latter will govern to the fullest extent the rights of the parties as to all matters covered by it. The present case is of this character, looked at in the aspect most favorable for the claimant. Even assuming, in spite of the language used, that the correspondence which culminated in the letter of March 18, 1918, evidenced a requisitioning of 30,000 tons of copper, it is impossible to go further and deny

[1] For somewhat similar cases in England see *Bretts Patent* v. *Smith & Co.* (1918), W. N. 157, and *Brooks Tool Co.* v. *Hydraulic Gears* (1919), W. N. 291.

that this previous correspondence, followed by claimant's letter of acceptance of April 11, 1918, constituted a definitive, valid agreement as to the shipment of the copper and the price to be paid therefor.

(*e*) Assuming then that, whether behind the transaction there stood (or lurked) a taking of property by the Government or not, there was a valid definite contract between the claimant and the United States as to the manner of taking, i. e., shipments, and the price to be paid for all the 30,000 tons of copper, the petition in its present form cannot be maintained, because it does not seek damages for breach of the contract by the United States but, repudiating the contract as to shipment of copper made after July 2d, seeks to recover for such copper a just, constitutional compensation, which compensation, however, it alleges to be the maximum price agreed upon on July 2, 1918, between the War Industries Board and the copper producers. At the outset, the petition itself relies upon the contract as stipulating for delivery of the whole 30,000 tons on or before June 1, 1918; it then alleges that only 10,575 tons were delivered prior to June 1, 1918, that between that date and July 2, 1918 (the day on which a new price for copper was agreed to), 9,034 additional tons were shipped, leaving undelivered of the 30,000 tons 9,299; but it alleges that the failure to ship all the copper prior to June 1, 1918, or July 2, 1918, was due to no fault of the claimant, but to lack of shipping orders, steamboat space and other causes beyond claimant's con-

trol. And it is from a premise built up out of these allegations that it seeks to dispense with and displace all the obligations arising from the contract in favor of an obligation to pay just compensation for all the copper which it failed to deliver as required by the contract.

Evidently such a position can not be maintained in reason or in law. We have argued above (and we now assume) that there was a valid, definitive contract between the claimant and the United States governing the delivery of all the 30,000 tons of copper and its price, which contract, looking at the matter in the light most favorable to claimant, took the place of the constitutional, just compensation (if, in fact, there was an exercise of the right of eminent domain). Whatever may be said as to the predestination of the claimant on the initial question of delivering the copper at all, there can be no possible doubt that its will was free when it came to agreeing as to the price and the deliveries, or that it voluntarily waived its right to rely upon the constitution, and voluntarily agreed as to the manner of delivery of the copper and the price therefor. Having done this, it must abide by its choice and work out its rights through the law of contracts. Whatever damages it may have suffered through breach of the contract by the United States, it is entitled to recover upon a proper showing. It can not, however (as it attempts to do in this petition), ignore the contract and recover as though the

property had been forcibly taken without any agreement whatsoever between the parties. Especially it can not (as it seems to be seeking to do) rely upon the contract as to deliveries and price of copper shipped prior to July 2, 1918, but repudiate and ignore it as to copper shipped thereafter.

(*f*) A claim is made in the brief on behalf of claimant that the petition may be treated as asking damages for breach of contract, which damages are based, necessarily, on the difference between 23½ cents per pound, the maximum price agreed upon up to June 1, 1918, and 26 cents per pound, the maximum price agreed upon July 2, 1918, for transactions after that date. This claim can not be supported. If the claimant had been a broker, buying and selling copper on the market, the difference between the market price at one time and the market price at another might be relevant on a claim for damages for preventing delivery at a certain date. The claimant, however, was a producer, or the agent of producers, and, consequently, if the petition had intended to claim damages for loss occasioned by failure of the United States to give shipping directions, it should have alleged specifically the items making up a greater cost to the claimant on the copper shipped after July 2, 1918, over the cost on the copper shipped prior to that date. The mere fact that, if the claimant had not entered into a contract for 30,000 tons at 23½ cents per ton, but, instead, had held its copper until after July 2, 1918, it might have obtained 26

cents a pound for it, can not justify a claim for damages for breach of contract based on that hypothesis. In fact, if the contract had been performed by both parties in exact accordance with its terms, and the 30,000 tons delivered prior to July 2, 1918, the claimant would have received, according to its own contention, only 23½ cents per pound for it. How, then, can it claim that because the United States prevented it from receiving the 23½ cents per pound, it is entitled, as damages for loss suffered, to 26 cents per pound? In truth the petition can not possibly be construed as one asking damages for breach of contract, and the claim to that effect in the brief is an afterthought. Furthermore, it may be noted, as a minor consideration, that the agreement of July 2, 1918, between the War Industries Board and the copper producers, did not purport to fix the maximum price of copper at 26 cents a pound as to transactions entered into, or sales made, prior to July 2, 1918, but only purported to affect prospectively contracts for copper entered into after its date.

(*g*) Some point is made in the brief on behalf of claimant to the effect that the present case is within the provisions of the Dent Act of March 2, 1919, c. 94, 40 Stat. 1272, 1273. This act, however, only applies to cases where the agreement "has not been executed in the manner prescribed by law." In the present case, a formal contract was executed in accordance with section 3744, Revised Statutes. It is true that claimant executed under protest, but

only as to the price fixed therein. That, however, only raised again the main point in the case, viz, whether or not there had been a prior informal contract covering the price; and, therefore, no additional force is given to the contention by the Dent Act, since the formal contract was sufficient to take the case out of that statute.

CONCLUSION.

The judgment of the Court of Claims should be affirmed.

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